Rengamah a/p Rengasamy v Tai Yoke Lai & Anor

HIGH COURT (MELAKA) — ORIGINATING SUMMONS NO 24–450 OF 1997
AUGUSTINE PAUL JC
11 NOVEMBER 1997

Contract *— Illegality — Sale and purchase of estate land — Contract made without approval of Estate Land Board — Contract was conditional upon the required approval — Whether agreement was null and void — National Land Code 1965 s 214A(11)*

Land Law *— Sale of land — Estate land — Agreement for sale of land was made without approval of Estate Land Board — Whether land was estate land within s 214A(11) of the National Land Code 1965 — Agreement was conditional upon the approval of the Board — Whether sale and purchase agreement was an instrument of transfer — Whether agreement was null and void — National Land Code 1965 s 214A(11)*

The plaintiff was the registered proprietor of a plot of land of about 3.52 acres ('the land'), which was part of a larger plot of land comprising a total of 76.778 hectares. The plaintiff entered into a sale and purchase agreement ('the agreement') to sell the land to the defendants. The plaintiff was then advised by her solicitors that by entering into the agreement without the approval of the Estate Land Board, she had committed an offence under s 214A of the National Land Code 1965 ('the NLC'). The plaintiff took steps to have the agreement rescinded and returned the deposit paid by the defendants to them. The defendants refused to accept the rescission. The plaintiff subsequently applied to court to have the agreement declared null and void, saying that it was illegal. As s 214A of the NLC deals with estate land, the court had to decide on two issues, namely, whether: (i) the land was estate land within the meaning of s 214A(11) of the NLC; and (ii) the agreement amounted to an instrument to transfer estate land within the meaning of s 214A(1) of the NLC.

Held, dismissing the application:

(1) To bring the land within the meaning of 'estate' land under s 214A(11) of the NLC, the burden was on the plaintiff to prove that the land was agricultural land and its area was not less than 40 hectares. In this case, the plaintiff had failed to establish that the land was estate land by failing to adduce evidence to show that it was agricultural land. It was therefore unnecessary to consider the issue of whether the land, which was less than 40 hectares in size, could still be estate land by virtue of its being part of a larger piece of land (see p 269F–H).

(2) Section 214A(4) of the NLC clearly provides that the owner of estate land must make the application for approval to the Estate Land Board jointly with the intended purchaser. There is no need to obtain approval first before entering into any form of

agreement with the intended purchaser. The agreement in this case accorded with the language and spirit of s 214A(1) of the NLC as it provides that there can be no transfer of the land without approval of the Estate Land Board having first been obtained. The agreement, being a conditional agreement, was therefore not illegal, and could not be declared null and void. It would only become null and void if the Estate Land Board refused approval of the sale of the land, which was not the issue here (see pp 270C and 272B–F).

[Bahasa Malaysia summary

Plaintif merupakan tuan punya berdaftar suatu plot tanah kira-kira 3.52 ekar ('tanah tersebut'), yang merupakan sebahagian plot tanah yang lebih besar yang terdiri daripada 76.778 hektar. Plaintif mengikat suatu perjanjian jual beli ('perjanjian tersebut') untuk menjual tanah kepada defendan-defendan. Plaintif kemudiannya dinasihati oleh peguamcaranya bahawa dengan mengikat perjanjian tersebut tanpa kelulusan Lembaga Tanah Ladang, beliau telah melakukan suatu kesalahan di bawah s 214A Kanun Tanah Negara 1965 ('KTN'). Plaintif telah mengambil langkah untuk membatalkan perjanjian tersebut dan mengembalikan deposit yang dibayar oleh defendan-defendan kepada mereka. Defendan-defendan enggan menerima pembatalan. Plaintif kemudiannya memohon kepada mahkamah untuk mengisytiharkan perjanjian tersebut batal dan tak sah, dengan mengatakan bahawa ia menyalahi undang-undang. Oleh kerana s 214A KTN adalah berkenaan tanah ladang, mahkamah hendaklah memutuskan dua isu, iaitu sama ada: (i) tanah itu adalah tanah ladang dalam lingkungan maksud s 214A(11) KTN; dan (ii) perjanjian tersebut sama seperti suatu instrumen pindahmilik tanah ladang dalam lingkungan maksud s 214A(1) KTN.

Diputuskan, menolak permohonan:

(1) Bagi membawa tanah itu dalam lingkungan maksud tanah 'ladang' di bawah s 214A(11) KTN, beban terletak pada plaintif untuk membuktikan bahawa tanah itu adalah tanah pertanian dan keluasannya adalah tidak kurang daripada 40 hektar. Dalam kes ini, plaintif telah gagal membuktikan bahawa tanah itu adalah tanah ladang dengan kegagalan untuk mengemukakan keterangan bagi menunjukkan bahawa ia adalah tanah pertanian. Dengan itu, adalah tidak perlu untuk mempertimbangkan isu sama ada tanah itu, yang keluasannya kurang daripada 40 hektar, masih boleh menjadi tanah ladang disebabkan ia adalah sebahagian bidang tanah yang lebih besar (lihat ms 269F–H).

(2) Seksyen 214A(4) KTN jelas memperuntukkan bahawa pemilik tanah ladang mestilah membuat permohonan untuk kelulusan kepada Lembaga Tanah Ladang bersama dengan pembeli yang diniatkan. Tiada keperluan untuk memperolehi kelulusan Lembaga terlebih dahulu sebelum mengikat mana-mana

perjanjian dengan pembeli yang diniatkan. Perjanjian tersebut dalam kes ini mematuhi bahasa dan hasrat s 214A(1) KTN kerana ia memperuntukkan bahawa tiada tanah boleh dipindahmilik melainkan kelulusan dari Lembaga Tanah Ladang telah terlebih dahulu diperolehi. Perjanjian tersebut, yang merupakan suatu perjanjian bersyarat, dengan itu tidak menyalahi undang-undang, dan tidak boleh diisytiharkan batal dan tak sah. Ia hanya akan menjadi batal dan tak sah sekiranya Lembaga Tanah Ladang menolak kelulusan atas jualan tanah itu, yang bukan menjadi isu di sini (lihat ms 270C dan 272B–F).]

Notes

For cases on illegality, see 3 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 1733–1810.

For cases on estate land generally, see 8 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 2897–2898.

Cases referred to

Aberfoyle Plantation Ltd v Khaw Bian Cheng [1960] MLJ 47 (refd)

Batu Pahat Bank Ltd v The Official Assignee of the Property of Tan Keng Tin (a bankrupt) [1933] MLJ 237 (refd)

Borneo Housing Mortgage Finance Bhd v Bank Bumiputra Malaysia Bhd [1991] 2 MLJ 261 (refd)

Brown v Heffer (1967) 116 CLR 344 (refd)

Chi Liung Holdings Sdn Bhd v AG [1994] 2 SLR 354 (refd)

Chin Cheng Hong v Hameed & Ors [1954] MLJ 169 (refd)

Chong Kon Fah v Yong Siau [1983] 1 MLJ 271 (refd)

Chung Khiaw Bank Ltd v Hotel Rasa Sayang Sdn Bhd & Anor [1990] 1 MLJ 356 (refd)

Co-operative Central Bank Ltd (In receivership) v Feyen Development Sdn Bhd [1995] 3 MLJ 313 (refd)

Co-operative Central Bank Ltd (In receivership) v Feyen Development Sdn Bhd [1997] 2 MLJ 829 (refd)

Datuk Tan Leng Teck v Sarjana Sdn Bhd & Ors [1997] 4 MLJ 329 (refd)

Executive Aids Sdn Bhd v Kuala Lumpur Finance Bhd [1992] 1 MLJ 89 (refd)

Fitzgerald v FJ Leonhardt Pty Ltd (1995) FLR 252 (refd)

Kumpulan Sua Betong Sdn Bhd v Dataran Segar Sdn Bhd [1992] 1 MLJ 263 (refd)

Kumpulan Sua Betong Sdn Bhd v Ezan Sdn Bhd & Anor [1993] 2 MLJ 289 (refd)

McWilliam v McWilliam Wines Pty Ltd (1964) 114 CLR 656 (refd)

Yango Pastoral Co Pty Ltd v First Chicago Australia Ltd (1987) 21 ALR 585 (refd)

Legislation referred to

Companies Act 1965 s 67

A Contracts Act 1950 ss 24, 32, 33
National Land Code 1965 s 214A

Ravinathan Muthiah (Ravi Muthiah & Co) for the plaintiff.
WS Goh (Foo Nyong Tiam & Associates) for the defendants.

B **Augustine Paul JC**: The application before me brings into sharp focus the ambit and scope of s 214A of the National Land Code 1965 ('the NLC').

Rengamah a/p Rengasamy ('the plaintiff') is the registered proprietor of 5365/189750 undivided shares representing about 3.52 acres ('the said land') of the land held under Geran 3648 Lot 564 Mukim of Air Panas,
C District of Jasin comprising a total area of 189a 3r 00p (or 76.778 hectares) more particularly known as Plot No 23. On 17 January 1996, the plaintiff entered into a sale and purchase agreement ('the agreement') to sell the said land to Tai Yoke Lai and Tan Ah Hock ('the defendants') at a consideration of RM86,240. Upon execution of the agreement, the
D defendants paid a sum of RM40,000 as deposit. The balance of the sum due was to be paid in accordance with cl 3 of the agreement which reads as follows:

> The balance of the purchase price of Ringgit Malaysia Forty-six thousand two hundred and forty (RM46,240) only shall be paid within (1) one month from the date of receipt of approval from the Estate Land Board, Melaka
E (hereinafter called the date of completion of sale) in exchange for a valid and registrable transfer of the said property in favour of the purchaser/s his/ their nominee or nominees free from all encumbrances.

Clause 12 of the agreement which made provision for an addendum to be annexed to the agreement reads as follows:

F
> The terms and conditions set out in the addendum annexed hereto, if any, shall form part of this agreement and shall be read and construed and endorceable [sic] as if the terms and conditions set out the addendum were inserted in this agreement be [sic] any inconsistencies or conflict between the provisions of this agreement and the terms and conditions set out in
G addendum hereto shall prevail.

The addendum is in the following terms:

> Addendum referred to in cl 12
> (which is to be taken, read and construed as an essential part of this agreement)
>
H (i) The vendor shall simultaneously upon the execution of the agreement herein apply to the Estate Land Board, Melaka for permission to sale [sic] and transfer the said property to the purchasers and all cost incidental hereto shall be borne by the vendor.
>
> (ii) It is expressly agreed that in the event the application for sale and
I transfer is rejected, the vendor shall forthwith refund the deposit paid herein free of interest and thereafter this agreement shall be determined and declare [sic] null and void.

In or about August 1996, the plaintiff was advised by the solicitors Messrs Ravi Muthiah & Co that by entering into the agreement without

the approval of the Estate Land Board, she had committed an offence under s 214A of the NLC. She immediately instructed her solicitors to take steps to have the agreement rescinded and to return the deposit of RM40,000 that she had collected from the defendants to them. Accordingly, the solicitors took steps to return the RM40,000 to the defendants by letter dated 15 August 1996. The material parts of the letter read as follows:

> Kindly be notified that our client has now come to be fully informed of the purview of s 214A of the National Land Code 1965 and in particular to sub-s (1), 10A(a) and (b) of the said section and its implications and impeeding [sic] criminal liability involved and now wishes to absolve herself completely from the said agreement.
>
> In the circumstances, we have now been instructed to notify you, as the solicitors in attendance of the said sale and purchase agreement, that our client hereby annuls and rescinds ab initio the said agreement dated 17 January 1996, as she does not wish to expose herself further to any form of criminal liability by executing an agreement in clear breach of s 214A of the NLC. We have also been instructed to return herewith the sum of Ringgit Malaysia Forty thousand (RM40,000) only via our BOC clients' a/c cheque No 369939, as the sum paid by the 'purchasers' Mr Tai Yoke Lai and Tan Ah Hock as deposit and part payment under the said agreement.
>
> Kindly acknowledge receipt of the above sum, and kindly cancel and return the relevant memorandum of transfer and other documents (if any) executed in escrow by our client.

However the defendants, through their solicitors Messrs Fong Nyong Tiam & Associates, refused to accept the rescission of the agreement and returned the cheque for RM40,000 by their letter dated 4 September 1996. The material parts of the letter read as follows:

> As the above sale is subject to obtaining the prior approval of the Estate Land Board (which said application is still pending), there is definitely no ground on the part of your vendor to rescind the said agreement without exposing herself to a suit for damages for breach of contract and/or specific performance accordingly.
>
> In the circumstances, we have been instructed to return herewith the said Bank of Commerce cheque No 369939 dated 15 August 1996 for the sum of Ringgit Malaysia Forty thousand only (RM40,000) for your attention for which kindly acknowledge receipt.

The reply to this letter by the plaintiff's solicitors to the solicitors for the defendants is in the following terms:

> Kindly take note that upon reverting your letter to our client, our client still insists on her earlier instructions and as such we reiterate our client's stand to rescind the sale and purchase agreement with your clients dated 17 January 1996 for the above mentioned land.
>
> In the circumstances, we have been instructed to state that the sum of RM40,000 has been deposited with us, as solicitors and your clients are at liberty to collect the same from our office.
>
> Kindly note that if we do not hear from you or your clients within seven (7) days hereof, we have strict instructions to apply to court for declarations for the rescission of the said agreement of 17 January 1996, and all costs arising thereof will have to be borne by your clients.

In the circumstances the plaintiff, by her originating summons filed on 21 December 1996, prayed for an order, inter alia, that the agreement that she had entered into with the defendants be declared null and void as it is illegal.

It will therefore be seen that the crux of the contention between the parties centers on s 214A of the NLC which reads as follows:

> (1) Notwithstanding anything contained in this Act, no estate land is capable of being transferred, conveyed or disposed of in any manner whatsoever, to two or more persons unless approval of such transfer, conveyance or disposal has first been obtained from the Estate Land Board (hereinafter referred to as 'the Board') established under sub-s (3).
>
> (2) The Registrar shall not register any instruction of transfer of such land under Pt 18 of this Act unless such instrument is accompanied by a certificate of approval granted by the Board.
>
> (3) For the purpose of this section there shall be established an Estate Land Board consisting of —
>
> (a) the State Secretary, who shall be the chairman; and
>
> (b) not more than four members appointed by the State Authority from amongst members of the public service.
>
> (4) The proprietor or any co-proprietor of any estate land desiring to transfer, convey or dispose of in any manner whatsoever such land to two or more persons shall together with such persons jointly submit an application to the Board in Form 14D.
>
> (5) The Board may approve an application made under sub-s (4) and shall have power to refuse or cancel an approval of such application if —
>
> (a) it is satisfied that any statement or representation made in the application is false or incorrect; or
>
> (b) it is satisfied that the applicant fails or refuses to comply with any direction given or restrictions or conditions imposed by it; or
>
> (c) it appears to it that the approval of the application will not be in the public interest.
>
> (6) Decision of the Board shall be by majority of votes; and in the case of equality of votes the chairman shall have a casting vote.
>
> (7) Before making any decision the Board may as it thinks fit call any person to give any statement before it or produce any document to be examined by it.
>
> (8) Where approval of an application under sub-s (4) is refused or cancelled by the Board, the applicant may, within 30 days after the communication to him of the Board's decision of such refusal or cancellation appeal in writing to the State Authority.
>
> (9) The State Authority may confirm or reverse the decision of the Board:
>
> Provided that where the decision of the Board is reversed by the State Authority, the State Authority may give such direction or impose such restriction or condition as it may think fit.

(10) Any person who obtains or attempts to obtain approval of the Board by knowingly making or producing or causing to be made or produced any false or fraudulent declaration, certificate, application or representation, whether in writing or otherwise or who fails or refuses to comply with any direction, restriction or condition imposed on him shall be guilty of an offence and shall on conviction be liable to a fine not exceeding RM10,000 and where the offence is a continuing one shall be further liable to fine of not exceeding RM1,000 in respect of each day the offence is committed.

(10A) (a) Any person who transfers, conveys or disposes of or attempts to transfer, convey or dispose of in any manner whatsoever, any estate land in contravention of sub-s (1), shall be guilty of an offence and shall on conviction be liable to imprisonment for a term of not less than one year and not more than three years and to a fine not exceeding ten thousand dollars.

(b) For the purposes of this sub-section, the execution of an agreement to convey or dispose of the whole of an estate to two or more persons, or to convey or dispose of any portion or portions of an estate land to one or more persons, without the approval of the Board, shall be conclusive proof that the estate land is conveyed or disposed of in contravention of sub-s (1); and any act to demarcate an estate land or to cause or permit the demarcation of estate land otherwise than in accordance with the provisions of this Act shall be prima facie proof that the person so acting, causing or permitting attempts to transfer, convey or dispose of the estate land in contravention of sub-s (1).

(11) For the purpose of this section 'estate land' means any agricultural land held under one or more than one title the area or the aggregate area of which is not less than 40 hectares and the lots constituting such area are contiguous.

(12) For the purpose of this section, the said lots shall be taken to be contiguous if they are separated from each other only by such land as is used, required or reserved for roads, railways or waterways.

In his submission, learned counsel for the plaintiff contended that the said land being agricultural land and forming part of Plot No 23 is deemed to be estate land within the meaning of s 214A(11) of the NLC. As there are two purchasers involved in the agreement, s 214A(1) of the NLC is thereby activated. He stressed that the section requires the approval of the Estate Land Board to be obtained first before any land is capable of being disposed of in any manner whatsoever. In this regard, he referred to *Kumpulan Sua Betong Sdn Bhd v Dataran Segar Sdn Bhd* [1992] 1 MLJ 263 where Jemuri Serjan CJ (Borneo) said at p 274:

> ... in the case of s 214A, no land is capable of being transferred unless approval of such transfer has *first* been obtained. In other words, the prior approval of the Estate Land Board is a postulated prerequisite to the validity of the transfer. Approval after transfer is not contemplated nor intended in s 214A and so is out of the question. (Emphasis added.)

Learned counsel proceeded to argue that the words 'capable of being ... disposed of in any manner whatsoever' in s 214A(1) of the NLC would

encompass a situation where a conditional agreement for sale, like the agreement in this case, is executed and in support referred to *Chin Cheng Hong v Hameed & Ors* [1954] MLJ 169 where Buhagiar J said at p 170:

> ... The contractual right may be sufficient to give a person an 'interest' in the land for the purpose of protection by restrictive entry in the register; the claim to an interest in land arising out of the contract is sufficient to make it a caveatable interest and to support a caveat (*Re Registration of Caveat* (1908) Innes 114).

He proceeded to argue that the insertion of the addendum in the agreement has brought into existence a binding contract for the disposal of the said land and accordingly, exposes the plaintiff to criminal liability under s 214A(10A) of the NLC. He then referred to *Kumpulan Sua Betong Sdn Bhd v Dataran Segar Sdn Bhd* to support his stand that s 214A(1) and (10A) of the NLC must be read conjunctively with the result that proof of the commission of an offence can be gathered from the fact of the execution of an agreement to convey or dispose of the land without the approval of the Estate Land Board. The execution of the agreement makes it conclusive proof that the estate land is conveyed or disposed of in contravention of s 214A(1) of the NLC. Learned counsel then moved on to consider the effect of the criminal liability of the plaintiff on the legality of the agreement. He said that as the object of the agreement is unlawful, s 24 of the Contracts Act 1950 renders it void. He again referred to *Kumpulan Sua Betong Sdn Bhd v Dataran Segar Sdn Bhd* where Jemuri Serjan CJ (Borneo) said at p 273:

> The next pertinent question to be asked is: Does the transfer of that lot also become invalid or void because it contravenes s 214A(1)? In other words, can it not be argued that if it is an offence to transfer a portion of an estate land, being in contravention of s 214A, similarly that transfer of Lot 849 is accordingly and for the same reasons invalid? It would seem to us that if a transfer of a portion of an estate land is conclusive proof by force of a statutory provision of the contravention of s 214(1) for the purpose of a conviction then, a fortiori, it must, by implication, also be conclusive proof of contravention of the same subsection for the purpose of invalidating the transfer of the lot. Any other construction of sub-s (10A)(a), (b) and sub-s (1) and effect of such construction would render s 214A ineffectual to achieve the attainment of its primary object which is the prevention and prohibition against fragmentation of estate land.

Learned counsel then contended that there are no saving provisions in s 214A to render the agreement valid as in the case of s 67 of the Companies Act 1965. In support of this proposition, he referred to *Yango Pastoral Co Pty Ltd v First Chicago Australia Ltd* (1978) 139 CLR 410 where Gibbs ACJ said:

> It is often said that a contract expressly or impliedly prohibited by statute is void and unenforceable. That statement is true as a general rule, but for complete accuracy it needs qualification, because it is possible for a statute in terms to prohibit a contract and yet to provide, expressly or impliedly, that the contract will be valid and enforceable. However, cases are likely to be rare in which a statute prohibits a contract but nevertheless reveals an

> intention that it shall be valid and enforceable, and in most cases, it is sufficient to say, as has been said in many cased of authority, that the test is whether the contract is prohibited by the statute.

He then referred to *Chung Khiaw Bank Ltd v Hotel Rasa Sayang Sdn Bhd & Anor* [1990] 1 MLJ 356 where Hashim Yeop Sani CJ (Malaya) said at p 361:

> Thus, in our view, it may be stated as a general principle that a contract the making of which is prohibited by statute expressly or implication, shall be void and unenforceable unless the statute itself saves the contract or there are contrary intentions which can reasonably be read from the language of the statute itself.

In his submission, learned counsel for the defendants contended that the plaintiff has not adduced any evidence to show that the said land is estate land with the meaning of s 214A of the NLC. He said that the plaintiff ought to have tendered a copy of the land title to reveal the status of the said land but that was not done. He added that even if the said land is estate land the parties have contracted to comply with law as they have agreed to proceed with the transfer only after the required consent had been obtained from the relevant authority. In support of his argument, he referred to cases such as *Chong Kon Fah v Yong Siau* [1983] 1 MLJ 271; *Borneo Housing Mortgage Finance Bhd v Bank Bumiputra Malaysia Bhd* [1991] 2 MLJ 261; *Executive Aids Sdn Bhd v Kuala Lumpur Finance Bhd* [1992] 1 MLJ 89 and *Fitzgerald v FJ Leonhardt Pty Ltd* [1995] FLR 252. On the submission of the plaintiff that ss 214A(1) and (10A) must be read conjunctively learned counsel referred, rightly in my opinion, to the lucid judgment of Eusoff Chin SCJ (as he then was) in *Kumpulan Sua Betong Sdn Bhd v Ezan Sdn Bhd & Anor* [1993] 2 MLJ 289 where his Lordship said at pp 296–297:

> Our attention was drawn by learned counsel for the appellant to sub-s (10A)(b) of s 214A of the National Land Code 1965. We find that this sub-s (10A) was inserted by Act A124 effective from 21 October 1969. Subsection (10A)(a) created an offence which is committed by a proprietor of an estate land if he contravenes the provision of sub-s (1) of s 214A. Subsection (10A)(b), however, creates a presumption that if a proprietor of an estate land executes an agreement to convey or dispose the estate land to two or more persons, or to convey or dispose any portion or portions of the estate land to one or more persons without the approval of the Estate Land Board, *he commits the offence* under sub-s (10A)(a) of s 214A. We have come to this conclusion because of the clear introductory words used by Parliament in enacting this sub-s (10A)(b) which are: 'For the purposes of this subsection ... ', which means, 'For the purposes of sub-s (10A) only', which in turn means for the purposes of proof of any offence in any prosecution under sub-s (10A)(a). The provision in sub-s (10A)(b) therefore cannot and should not be stretched to supplement the precise words used by Parliament in sub-ss (1) and (4) of s 214A. While we quite appreciate that the object of s 214A is to discourage the fragmentation of estate lands, we are reminded that the court's function is to interpret, not to make law.

A It is now settled law that a contract which is prohibited by statute does not become void and unenforceable if the statute itself saves the contract or there are contrary intentions which can reasonably be read from the language of the statute itself. Section 24 of the Contracts 1950 does not apply to such a contract for the obvious reason that the statute itself has saved the contract which was otherwise forbidden (see *The Batu* B *Pahat Bank Ltd v The Official Assignee of the Property of Tan Keng Tin (a bankrupt)* [1933] MLJ 237; *Co-operative Central Bank Ltd (In receivership) v Feyen Development Sdn Bhd* [1995] 3 MLJ 313; *Co-operative Central Bank Ltd (In receivership) v Feyen Development Sdn Bhd* [1997] 2 MLJ 829 and *Datuk Tan Leng Teck v Sarjana Sdn Bhd & Ors* [1997] 4 MLJ 329). Be that C as it may, this issue arises for consideration only if, in the first place, it has been established that:

(i) the said land is estate land within the meaning of s 214A(11) of the NLC; and

(ii) if the answer is in the affirmative, whether the agreement amounts to D an instrument to transfer estate land within the meaning of s 214(1) of the NLC.

I shall now consider these issues.

Whether the said land is estate land within the meaning of s 214A(11) of E *the NLC*

Section 214A(11) of the NLC defines 'estate land' as:

> ... any agricultural land held under one or more than one title the area or aggregate area of which is not less than 40 hectares and the lots consitituting such area are contiguous.

F

On the facts of this case, the burden is on the plaintiff to establish that:

(i) the said land is agricultural land; and

(ii) its area is not less than 40 hectares.

G The submission of learned counsel for the plaintiff on this aspect of the case is based on the mere assumption that the said land is agricultural land and, further, as it forms part of the land which is more than 40 hectares, it is therefore estate land. With regard to the first issue, no evidence was led by the plaintiff to show that the said land is agricultural land. This is sufficient to rule that the plaintiff has failed to establish that the said land H is estate land thereby rendering it unnecessary for me to consider the other part of this issue, that is to say, whether the said land which is less than 40 hectares in area is still estate land by virtue of being part of land which is more than 40 hectares in area.

I *Whether the agreement amounts to an instrument to transfer estate land without approval within the meaning of s 214A(1) of the NLC*

As I said earlier, it was the contention of learned counsel for the plaintiff that the agreement amounts to a binding contract for the disposal of the

said land without the required approval and that it thereby exposes the plaintiff to criminal liability under s 214A(10A) of the NLC with the result that the agreement becomes void. It must be remembered that the subsection attracts criminal liability only when a person transfers, conveys or disposes of or attempts to transfer, convey or dispose of in any manner whatsoever, any estate land in contravention of sub-s (1). Section 214A(1) of the NLC stipulates that no estate land is capable of being transferred, conveyed or disposed of in any manner whatsoever, to two or more persons unless approval of such transfer, conveyance or disposal has first been obtained from the Estate Land Board. The submission of the plaintiff gives the impression that there is a prohibition against an owner of estate land entering into any form of agreement with an intended purchaser before having first obtained the approval of the Estate Land Board. With respect, I am unable to agree with that view. Section 214A(4) clearly contemplates that the owner of an estate land must make the application for approval jointly with the intended purchaser. The subsection reads as follows:

> The proprietor or any co-proprietor of any estate land desiring to transfer, convey or dispose of in any manner whatsoever such land to two or more persons shall together with such person *jointly* submit an application to the Board in Form 13C. (Emphasis added.)

In fact, one of the particulars required to be filled in the prescribed form is the name and address of the intended transferee or purchaser. Thus, the existence of an intended purchaser is a prerequisite for making an application for approval to the Estate Land Board. Before an intended purchaser can come into existence, there must have been negotiations and agreement between him and the proprietor on the price and other relevant terms. Surely, a record of the negotiations requires to be kept to facilitate completion of the agreement when the appropriate time comes. This can be best achieved by the execution of a provisional or conditional agreement between them. This, in my opinion, is contemplated by s 214A(4). That is precisely what the plaintiff did. Clause 3 and the addendum to the agreement depict the conditional nature of the agreement and the effect of failure to obtain the required consent in crystalline terms. This does not violate s 214A(1). The contention of the plaintiff that the agreement amounts to a binding contract flow from a misapprehension of the law relating to contingent contracts. A sight at ss 32 and 33 of the Contracts Act 1950 will shed light on the nature and scope of contingent contracts. Both the sections are in following terms:

> Section 32
>
> A 'contingent contract' is a contract to do or not to do something, if some event, collateral to the contract, does or does not happen.
>
> Section 33
>
> (i) Contingent contracts to do or not to do anything if an uncertain future event happens cannot be enforced by law unless and until that event has happened.
>
> (ii) If the event becomes impossible, such contracts become void.

A The effect of a conditional contract, as in the case of the agreement, is illustrated by the case of *Aberfoyle Plantation Ltd v Khaw Bian Cheng* [1960] MLJ 47. In 1955, the parties in that case agreed to sell and to buy a plantation part of which consisted of 182 acres comprised in seven leases that had expired in 1950. In the intervening years, the vendor had tried but B failed to obtain a renewal of the leases. Clause 4 of their agreement provided that 'the purchase is conditional on the vendor obtaining a renewal of the lease'. If he proved 'unable to fulfil this condition this agreement shall become null and void'. The vendor failed to obtain the renewal. The Judicial Committee of the Privy Council held that, on a true construction of the contract, the condition in cl 4 had to be fulfilled by the C date fixed for completion and, until the condition was fulfilled, there was no contract of sale to be completed. Lord Jenkins, in delivering the advice of the Board, said at p 51:

> ... at the very outset of the agreement, the vendor's obligation to sell, and the purchaser's obligation to buy, were by clause 1 expressed to be subject D to the condition contained in cl 4. It was thus made plain beyond argument that the condition was a condition precedent on the fulfillment of which the formation of a binding contract of sale between the parties was made to depend.

Thus, in the case of the agreement, cl 3 and the addendum make it clear E that the formation of a binding contract of sale of the said land depends on obtaining the required approval from the Estate Land Board. The agreement would be rendered null and void if the approval is not obtained. It will become enforceable only upon fulfilment of the condition stipulated therein. Until that condition is fulfilled, the essential and main obligation of the parties, ie the obligation of the plaintiff to sell and the obligation of the F defendants to purchase, remain inchoate (see *Chi Liung Holdings Sdn Bhd v A-G* [1994] 2 SLR 354). In *Brown v Heffer* (1967) 116 CLR 344, a testator devised lands under the Closer Settlement Acts of New South Wales to a beneficiary. After the will was made, he contracted to sell the lands to a third party and, under the contract, he had to obtain the consent G of the Minister of Lands to transfer, which could not be effected without such consent. Whilst the application for the consent was pending, the testator died. Consent was only given subsequently. It was held that the device under the will was not adeemed by the contracts as, pending the receipt of the ministerial consent, the contracts were inchoate. The court said at p 350:

H

> In the present case, it is clear that the contracts for the sale of the settlement purchase leases, though absolute in so far as they bound the parties to do what was necessary for obtaining the minister's consent, were inchoate in so far as they provided for sale and transfer. Not until after the testator's death, consent was obtained so that transfers having legal operation could be made I did any contract of sale emerge from the inchoate stage (to adopt language used in *Roach v Bickle* (1915) 20 CLR 663 at p 671). It follows that the land, not having been converted into money under the principle of equity during the testator's lifetime, was still his to dispose of at his death, though it was even then bound by a contract which, if the minister's consent should

thereafter be obtained, would become a contract of sale with the result that the respondent as devisee would in the end received only the purchase money. A

It must be further observed that the receipt of a part of the purchase price by the plaintiff under the agreement does not alter the status of the parties nor the character of the agreement (see *McWilliam v McWilliam Wines Pty Ltd* (1964) 114 CLR 656). The agreement therefore accords with the B language and spirit of s 214A(1) of the NLC as it provides that there can be no transfer of the said land without approval of the Estate Land Board having first been obtained. The corollary is that the agreement does not amount to an istrument to transfer estate land within the meaning of s 214A(1) of the NLC.

C

In the premises, I hold that the plaintiff has failed to establish that the said land is estate land within the meaning of s 214A(11) of the NLC. This suffices to make a ruling in the application before me. However, even if it can be argued that the said land is estate land, the agreement does not conflict with the requirements of s 214A of the NLC. The language employed in the section, in particular s 214A(4), shows that the agreement D is not void. In fact, the subsection contemplates such an agreement. The terms of the agreement dictate that until the condition specified therein is fulfilled, the said land is not capable of being transferred, conveyed or disposed of in any manner whatsoever as the agreement does not take effect as a contract of sale till then. It is therefore not illegal and, accordingly E cannot be declared null and void. It will only become null and void upon refusal of the Estate Land Board to approve the sale of the said land. This, however, is not in issue before me. In any event, as I said earlier, even if it can be argued that the agreement is binding and is therefore prohibited, it does not become void and unenforceable as there are contrary intentions in s 214A. In the upshot, I dismiss the plaintiff's application with cost. F

Application dismissed.

Reported by David Lai

G

H

I